COMMERZBANK (SOUTH EAST ASIA) LTD *a*

v.

DENNIS LING LI KUANG

HIGH COURT SABAH & SARAWAK, KUCHING *b*
MUHAMMAD KAMIL AWANG J
[ORIGINATING SUMMONS NO: 24-114-99-III/II]
28 JANUARY 2000

CIVIL PROCEDURE: *Judgment - Foreign judgment - Registration of - Application to set aside registration of foreign judgment on ground that judgment rooted in illegality - Whether Malaysian laws had extra-territorrial application - Whether High Court had jurisdiciton to determine issue - Whether defendant could be allowed to profit from own wrong doing - Exchange Control Act 1953, s. 4(2) - Reciprocal Enforcement of Judgments Act 1958* *c* *d*

The defendant had applied for credit facilities from the plaintiff in Singapore without the permission of the Controller of Foreign Exchange of Malaysia. Subsequently, the plaintiff obtained a judgment against the defendant in Singapore High Court for USD5 million and registered the judgment at the High Court Sabah & Sarawak, Kuching. The defendant sought to set aside the registration of the judgment, and argued before the learned judge that: (i) the enforcement of the judgment was contrary to public policy, as he had not obtained prior written permission of the Controller of Foreign Exchange of Malaysia for the credit facilities in contravention of the provisions of the Exchange Control Act 1953 ('the Act'); and (ii) the granting of the credit facilities was illegal being contrary to the provisions of the Act. *e* *f*

Held:

[1] Although the defendant had obtained the credit facilities without the permission of the Controller of Foreign Exchange Malaysia in contravention of s. 4(2) of the Act, the Act does not prohibit a Malaysian resident or citizen from borrowing foreign currencies outside Malaysia. This is because the Act has no extra-territorial application, and therefore, neither party flouted s. 4(2) of the Act. The contract between the parties is not therefore illegal. *g* *h*

[2] An application to set aside the registration of a foreign judgment concerns with the procedural law of registration. The defendant had not shown that the registration was bad for non-compliance of the *i*

Reciprocal Enforcement of Judgments Act 1958. That being so, the issues raised by the defendant were irrelevant. Malaysian laws have no extra-territorial application, and therefore this court has no jurisdiction to determine whether the foreign judgment was rooted in illegality.

[3] In any case, if the purpose of the facilities in Singapore was to circumvent the Malaysian laws, *ie*, the Exchange Control Act 1953, then the defendant must not be allowed to profit from his own wrong doing at the expense of an innocent party.

[Application dismissed.]

Case(s) referred to:

Bank Of India v. Trans Continental Commodity Merchants Ltd & Anor [1986] 2 MLJ 342 ***(refd)***

Keppel Finance Ltd v. Phoon Ah Lek [1994] 3 MLJ 26 ***(refd)***

Lee Lee Cheng (f) v. Seow Peng Kwang [1960] 26 MLJ 1 ***(refd)***

Legislation referred to:

Exchange Control Act 1953, ss. 4(2), 9(1), 36(1)

For the plaintiff - Lim Lip Sze; M/s Reddi & Co

For the defendant - Rosleenda Sayumi Ismail; M/s Idris & Co

Reported by WA Sharif

JUDGMENT

Muhammad Kamil Awang J:

The plaintiff obtained a judgment against the defendant in Singapore High Court for a sum of USD5 million dated 28 July 1998. This judgment was registered at the High Court Sabah & Sarawak, Kuching, and a notice thereof was served on the defendant on 9 June 1999.

This is the defendant's application to set aside the registration of the foreign judgment on the following grounds:

(a) that the enforcement of judgment is contrary to public policy in Malaysia insofar as the defendant had not obtained prior written permission of the Controller of Foreign Exchange who is the Governor of Bank Negara, contrary to the provision of the Exchange Control Act 1953, for the opening of account with the plaintiffs and neither the plaintiff nor the defendant obtained prior written permission of the said controller of Foreign Exchange for the credit facilities granted by the plaintiffs to the defendant; and

(b) that the opening of the account and the granting of banking facilities were illegal being contrary to the provisions of the Exchange Control Act 1953 and the respective notices issued thereunder and contrary to public policy of Malaysia.

In the instant case, the defendant had obtained credit facilities from the plaintiff in Singapore without the permission of the Controller of Foreign Exchange Malaysia, thus in contravention of s. 4(2) of the Exchange Control Act 1953. However, the 1953 Act does not prohibit a Malaysian resident or citizen from borrowing foreign currencies outside Malaysia. This is because the Act has no extra-territorial application, and therefore neither party had flouted s. 4(2) of the Act, thus the contract between the parties is not illegal. On the question of extra territoriality it is useful to refer to the case of *Lee Lee Cheng (f) v. Seow Peng Kwang* [1960] 26 MLJ 1, where his Lordship, Thomson CJ said at p. 3:

> there is a distinction between the jurisdiction of a court and its powers, and this suggests that the word "jurisdiction" is used to denote the types of subject matter which the court may deal with and in relation to which it may exercise its powers. It cannot exercise its powers in matters over which, by reason of their nature or by reason of extra-territoriality, it has no jurisdiction. On the other hand, in dealing with matters over which it has jurisdiction, it cannot exceed its powers.

In *Keppel Finance Ltd v. Phoon Ah Lek* [1994] 3 MLJ 26, VC George J (as he then was) held that s. 4(2) of the Exchange Control Act 1953 ("the ECA") does not per se prohibit residents in Malaysia from borrowing foreign currency outside Malaysia as it is restricted to acts done "in Malaysia". Since "resident" is defined to include Malaysian Citizens who do not reside in Malaysia, the words "in Malaysia" in s. 4(2) must be meant to qualify "borrowing" and not "resident". This also supports the view that ECM10, the document issued by Bank Negara under the ECA, has no application to borrowing by a resident outside Malaysia from a non-citizen.

Clearly, when the defendant applied for the loan from Malaysia to Singapore without the permission of the Controller, he had contravened s. 4(2). However as the actual borrowing took place in Singapore, it did not run foul of s. 4(2) or any other provision of the ECA or ECM10, and was not illegal.

The defendant had applied for credit-facilities in Singapore and he had no permission of the Controller of Foreign Exchange of Malaysia, and if the purpose of the facilities in Singapore was to circumvent the Malaysian laws (ie, the Exchange Control Act 1953), he must not be allowed to profit from his own wrongdoing at the expense of an innocent party.

With respect, the learned counsel for the defendant in her submission had totally missed the point. In an application to set aside the registration of a foreign judgment, it concerns with the procedural law of registration. She had not shown to the court that the registration was bad for non-compliance of our registration law ie, the Reciprocal Enforcement of Judgments Act 1958. That being so, the issues raised in her submission are not relevant for the consideration of the court. Malaysian laws have no extra-territorial application, unless there is evidence to the contrary, and therefore this court has no jurisdiction to determine whether the foreign judgment was rooted in illegality.

In *Bank Of India v. Trans Continental Commodity Merchants Ltd & Anor* [1986] 2 MLJ 342, where the applicant applied to set aside the registration under the Reciprocal Enforcement of Commonwealth Judgment Act (Chapter 24) of a judgment of the High Court of Justice, Queen's Bench Division and an order of the Court of Appeal England, it was contended that the said judgment and the cause of action on which it was given and the agreement or agreements from which the cause of action arose were an infringement of s. 2(b) of art. VIII of the Bretton Woods Agreement and were also infringements of ss. 4(2), 9(1) and 36(1) of the Malaysian Exchange Control Act 1953. Learned counsel for the applicant submitted that the registration of the said judgment was tantamount to enforcing a judgment rooted in illegality. The court in dismissing the application with costs held that the court cannot give judgment on contentious question of fact which had not been raised in the Courts in London. It is just and convenient that the judgment of the High Court of Judicature, Queen's Bench Division and the Order of the Court of Appeal, should be enforced in Singapore.

The learned judge went on to say that if the applicant had in fact set up Trans Continental Commodity Merchants Ltd. for the purpose of circumventing the Bretton Woods Agreement and the Malaysian Exchange Control Act, he must not be allowed to profit from his own wrong doing at the expense of an innocent party.

Based on the forgoing reasons, I will dismiss the application with costs to the plaintiff to be taxed unless agreed.